

Marc Van Der Hout (California Bar # 80778)
Zachary Nightingale (California Bar #184501)
Avantika Shastri (California Bar # 233453)
Van Der Hout, Brigagliano & Nightingale, LLP
180 Sutter Street, Fifth Floor
San Francisco, California 94104
Telephone: (415) 981-3000
Facsimile: (415) 981-3003
Email: ndca@vblaw.com

Attorneys for Petitioners
Graham SIMPSON, and
Barbara DAVISON

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Graham SIMPSON, and
Barbara DAVISON

Petitioners,

v.

Robin BARRETT, in her Official Capacity, Field
Office Director, U.S. Citizenship and Immigration
Services, U.S. Department of Homeland Security, San
Francisco, California; Rosemary MELVILLE, in her
Official Capacity, District Director, U.S. Citizenship
and Immigration Services, U.S. Department of
Homeland Security, San Francisco, California; Emilio
T. GONZALEZ, in his Official Capacity, Director,
U.S. Citizenship and Immigration Services, U.S.
Department of Homeland Security; Michael
CHERTOFF, in his Official Capacity, Secretary, U.S.
Department of Homeland Security; Peter D.
KEISLER, in his Official Capacity, U.S. Attorney
General, U.S. Department of Justice; and Robert S.
MUELLER, III, in his Official Capacity, Director,
Federal Bureau of Investigation

Respondents.

Case No. _____

**PETITION FOR WRIT OF
MANDAMUS**

Immigration Case, Administrative
Procedure Act Case

Agency No.: A 98-256-652

INTRODUCTION

1
2 1. This is an action for declaratory and mandatory relief, authorized by 28 U.S.C.
3 § 1361, the mandamus statute; 28 U.S.C. § 2201, the Declaratory Judgment Act; and 5
4 U.S.C. § 702, the Administrative Procedure Act.

5
6 2. This action seeks to compel the Department of Homeland Security (“DHS”),
7 U.S. Citizenship and Immigration Services (“USCIS”), to adjudicate in an expedited
8 manner the Petition for Alien Relative (Form I-130) (“I-130 visa petition”), filed by
9 Petitioner Barbara DAVISON (“Petitioner Davison”) on behalf of her husband, Petitioner
10 Graham SIMPSON (“Petitioner Simpson”), and Petitioner Simpson’s concurrently-filed
11 Application to Adjust Status (Form I-485) (“AOS application”). See Declaration of
12 Zachary Nightingale (“Nightingale Dec.”) at Exhibits (“Exh.”) C, D, E. Both the I-130
13 visa petition and the AOS application were properly filed on or about September 14,
14 2004. The I-130 visa petition forms the basis for Petitioner Simpson’s eligibility for
15 permanent residence, pursuant to 8 C.F.R. § 245.2(a)(2). The I-130 visa petition and
16 AOS application have now been pending for over three years.

17
18 3. On or about February 9, 2005, Petitioners Simpson and Davison were
19 interviewed at the San Francisco USCIS District Office in regards to Petitioner
20 Simpson’s application for adjustment of status. Id. at Exh. G. At the conclusion of the
21 interview, Petitioners received a notice stating that the application was pending for
22 security clearances. Id. at Exh. H. Since that time, to Petitioners’ knowledge, no action
23 has been taken on the AOS application.

24
25 4. According to the USCIS website, as of September 15, 2007, the agency’s
26 current processing time for AOS applications is six months. Id. at Exh. J. Although
27 Petitioner Simpson is eligible for adjustment of status, and has submitted all required and
28

1 requested documentation, the adjudication of his AOS application lags approximately
2 two and half years behind normal processing time. The delay in adjudication is
3 unreasonable and unlawful. Thus, Petitioners file this writ for mandamus action.
4

5 **JURISDICTION AND VENUE**

6
7 5. This Court has jurisdiction over the present action pursuant to 28 U.S.C. §
8 1361, the mandamus statute; 28 U.S.C. § 2201, the Declaratory Judgment Act; 28 U.S.C.
9 § 1331, general federal question jurisdiction; and 5 U.S.C. § 702, the Administrative
10 Procedure Act ("APA").

11 6. Venue is properly with this Court pursuant to 28 U.S.C. § 1391(e) because
12 this is a civil action in which the Respondents are employees or officers of the United
13 States, acting in their official capacity, and an agency of the United States; because a
14 substantial part of the events or omissions giving rise to the claim occurred in San
15 Francisco, California, in the Northern District of California; and because Petitioner
16 resides in the Northern District of California and there is no real property involved in this
17 action.
18

19 **INTRADISTRICT ASSIGNMENT**

20
21 7. This action should be assigned to the San Francisco or Oakland Division
22 because a substantial part of the events and omissions giving rise to this claim occurred
23 within the jurisdiction of those divisions, and because Petitioner resides in those
24 divisions. See Local Rules 3-2(c), (d).
25

26 **PARTIES**

1 8. Petitioner Graham Simpson is a native and citizen of the United Kingdom. He
2 resides in El Cerrito, California with his wife, Petitioner Barbara Davison, who is a
3 citizen of the United States. He is an applicant for Adjustment of Status to lawful
4 permanent residence based on a visa petition filed by his U.S. citizen wife, Petitioner
5 Davison, whom he married on October 11, 2002. See 8 U.S.C. §§ 1151(b)(2)(A)(i),
6 1255(a).
7

8 9. Petitioner Barbara Davison is a United States citizen by birth. She resides in
9 El Cerrito, California with her husband, Petitioner Graham Simpson. She filed an I-130
10 visa petition on Petitioner Simpson's behalf on or about September 14, 2004,
11 concurrently with Petitioner Simpson's AOS application.
12

13 10. Respondent Robin BARRETT is the Field Office Director of the San
14 Francisco office of the U.S. Department of Homeland Security, U.S. Citizenship and
15 Immigration Services, and is sued herein in her official capacity. See 8 C.F.R. §§ 2.1,
16 103.1.
17

18 11. Respondent Rosemary MELVILLE is the District Director of the San
19 Francisco District Office of the U.S. Department of Homeland Security, U.S.
20 Citizenship and Immigration Services, and is sued herein in her official capacity.
21

22 12. Respondent Emilio GONZALEZ is the Director of U.S. Citizenship and
23 Immigration Services, and is sued herein in his official capacity. See 8 C.F.R. §§ 2.1,
24 103.1.
25

26 13. Respondent Michael CHERTOFF is the Secretary of the U.S. Department of
27 Homeland Security, and is sued herein in his official capacity. In this capacity, he has
28 responsibility for the administration and enforcement of the immigration and

1 naturalization laws pursuant to section 402 of the Homeland Security Act of 2002, 107
2 Pub. L. No. 296, 116 Stat. 2135 (Nov. 25, 2002); see also 8 U.S.C. § 1103.

3 14. Respondent Peter D. KEISLER is the Attorney General of the Department of Justice,
4 and is sued herein in his official capacity. In this capacity, he has responsibility for providing
5 access to criminal history record information, pursuant to 8 U.S.C. §§ 1103(g), 1105(b).
6

7 15. Respondent Robert S. MUELLER, III is the Director of the Federal Bureau of
8 Investigation, and is sued herein in his official capacity. In this capacity, he has responsibility
9 for maintaining and providing access to criminal history record information.

10 **FACTUAL ALLEGATIONS**

11 16. Petitioners bring this action to compel USCIS to adjudicate Petitioner
12 Davison's I-130 visa petition and Petitioner Simpson's concurrently-filed AOS
13 application, which have been pending for over three years. Petitioner is eligible to adjust
14 his status to that of a lawful permanent resident based on the I-130 visa petition that his
15 United States citizen wife, Petitioner Davison, filed on his behalf. See Nightingale Dec.
16 at Exh. C, D, E; see also 8 U.S.C. § 1154(a)(1)(A)(i) (immediate relative petitioning
17 procedure); 8 U.S.C. § 1255(a) (adjustment of status application procedure); 8 C.F.R. §
18 1245.2(a)(2) (permitting concurrently-filed AOS applications and I-130 visa petitions).
19

20 17. Petitioner Simpson is a 49-year-old native and citizen of the United Kingdom.
21 He first entered the United States on December 4, 1987 on a visitor's (B-2) visa. That
22 visa was valid until June 3, 1988. On or about May 31, 1988, he filed an application to
23 change his status of a treaty investor (E-2), based on his establishment of a restaurant in
24 Kensington, California. That application was terminated on or about December 5, 1989.
25 He has not left the United States since that date. Id. at Exh. A.
26
27
28

1 18. Petitioner Simpson married Petitioner Davison on October 11, 2002, in San
2 Francisco, California. Id. at Exh. B. .

3 19. On or about September 14, 2004, Petitioner Davison filed an I-130 Visa
4 Petition on behalf of Petitioner Simpson, and Petitioner Simpson concurrently filed an
5 AOS application. Id. at Exh. C, D and E.

6 20. On or about November 12, 2004, Petitioners received a notice from
7 Respondent that the application for adjustment of Status had been received. A copy of
8 that notice is attached as Exhibit F.

9 21. On or about February 9, 2005, Petitioners were interviewed at the USCIS San
10 Francisco District Office in regards to the adjustment application. Id. at Exh. G. At that
11 time, they were told the application would be adjudicated pending completion of the
12 background check. Id. at Exh. H. Petitioner was also requested to complete a Form I-
13 508, which related to his application to change his status to a treaty investor. Id. at Exh. I.
14 He submitted the completed Form on February 18, 2005. See id.

15 22. According to the USCIS website, as of September 15, 2007, the agency's
16 processing timeframe for AOS applications, such as Petitioner Simpson's, is six months.
17 Id. at Exh. J. Although Petitioner Simpson is eligible to adjust his status to lawful
18 permanent resident and has submitted all required and requested documentation, the
19 adjudication of his AOS application lags approximately two and half years behind normal
20 processing time.

21 23. Petitioners have exhausted all available administrative remedies.

22 **CAUSES OF ACTION**

23 24. Paragraphs 1 through 23 are incorporated herein.

1 25. Any citizen of the United States claiming that an alien is entitled to
2 classification by reason of, inter alia, an immediate relative status under 8 U.S.C. §
3 1151(b)(2)(A)(i) may file a petition for such classification. See 8 U.S.C. §
4 1154(a)(1)(A)(i). Thereafter, if it is determined that the facts stated in the petition are
5 true and that the alien on behalf of whom the petition is made is an immediate relative, as
6 specified in section 8 U.S.C. § 1151(b), he or she shall approve the petition and forward
7 one copy to the Department of State (“DOS”). See 8 U.S.C. § 1154(b). Where a visa is
8 immediately available to the alien beneficiary, USCIS regulations permit the applicant to
9 file an AOS application concurrently with an immediate relative visa petition. See 8
10 C.F.R. § 245.2(a)(2). Immigrant visas are immediately available to the spouses of United
11 States citizens. See 8 U.S.C. § 1151(b)(2). Accordingly, in this case, the I-130 visa
12 petition that Petitioner Davison filed on Petitioner Simpson’s behalf would not have been
13 forwarded to DOS upon approval, but would have been retained by the local USCIS
14 office where the AOS is concurrently filed. See 8 C.F.R. § 245.2(a)(3).

17 26. Petitioner Simpson is the spouse of a United States citizen, Petitioner
18 Davison, and is therefore immediately eligible to be accorded immigrant status. He
19 entered the United States legally as a visitor and was inspected upon admission; he is the
20 immediate relative spouse of a United States citizen, and thus eligible to adjust his status
21 in the United States to the status of a lawful permanent resident. See 8 U.S.C. §§
22 1151(b)(2)(A)(i), 1255(a), 1255(c).

24 27. On or about September 14, 2004, Petitioner Davison filed an I-130 visa
25 petition and Petitioner Simpson concurrently filed an AOS application and an I-130 visa
26 petition, with filing fees and supporting documentation, with the San Francisco USCIS
27 District Office. See Nightingale Dec. at Exh. C, D, E. The San Francisco District Office
28

1 of USCIS is currently processing similar adjustment applications that were filed
 2 approximately six months ago. Id. at Exh. J.

3 28. Mandamus is an appropriate remedy whenever a party demonstrates a clear
 4 right to have an action performed by a governmental official who refuses to act.
 5 Donovan v. United States, 580 F.2d 1203, 1208 (3d Cir. 1978).
 6

7 29. Respondents have a duty to act upon the petition and application and have
 8 failed to do so in a reasonable time or manner. See, e.g., Patel v. Reno, 134 F.3d 929 (9th
 9 Cir. 1997). They have failed to adjudicate Petitioner Davison's I-130 visa petition, which
 10 she filed on behalf of Petitioner Simpson, and Petitioner Simpson's immediate relative
 11 AOS application. Respondents have thus violated the Immigration and Nationality Act.
 12

13 30. In addition, Respondents have violated the Administrative Procedures Act,
 14 which provides that a reviewing court shall compel agency action unlawfully withheld or
 15 unreasonably delayed. 5 U.S.C. § 706(1).

16 31. Petitioners have exhausted all other available remedies. They have "no other
 17 adequate means to attain the relief [they] desire[]." Allied Chemical Corp. v. Daiflon,
 18 Inc., 449 U.S. 33, 35 (1980). Their right to issuance of the writ is therefore "clear and
 19 indisputable." Id.
 20

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Petitioners pray that this Court grant the following relief:
 23

- 24 (1) Assume jurisdiction over this matter;
- 25 (2) Order that USCIS adjudicate Petitioner Davison's Petition for
 26 Alien Relative (Form I-130) within 30 days;
- 27 (3) Order that USCIS adjudicate Petitioner Simpson's Application to
 28 Adjust Status (Form I-485) within 30 days;

- 1 (4) Award reasonable costs and attorneys' fees; and
2 (5) Grant such further relief as the Court deems just and proper.
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4

5 Dated: September 27, 2007

Respectfully submitted,

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7 Zachary Nightingale
8 Marc Van Der Hout
9 Avantika Shastri
10 Van Der Hout, Brigagliano &
11 Nightingale, LLP
12 180 Sutter Street, Fifth Floor
13 San Francisco, California 94104
14 Telephone: (415) 981-3000
15 Facsimile: (415) 981-3003
16 Email: ndca@vblaw.com

17 Attorneys for Petitioners

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19 By: 

20 Zachary Nightingale
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